



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISC. APP. NO. 234 OF 2017**

*(Formally HCCC MISC. APP 653 of 2017)*

**PARAGON ELECTRONIC LIMITED.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**OUSAINOU NGUM.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KHADIJATOU NGUM.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**MWANIKI GACHOKA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 6<sup>th</sup> November 2017. It is brought under Articles 50(1) of the Constitution, Section 14 of the Arbitration Act, 1995, Section 1A, 1B, 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules 2010.

2. It seeks order:-

**1. Spent**

**2. That this Honourable Court allow leave to file the application out of time.**

**3. spent**

**4. That this Honourable Court be pleased to direct the parties to nominate and agree on the identity of a new arbitrator within such period as the court shall specify.**

**5. That failure to reach such an agreement, this honourable court be pleased to appoint a new arbitrator to act in place of the 3<sup>rd</sup> respondent.**

**6. The costs of this application be provided for.**

3. The grounds are on the face of the application and are listed as in paragraph a to i.

4. The application is supported by the affidavit of Bulent Gulbahar, the director of the applicant sworn on the 6<sup>th</sup> November 2017.

5. The application is opposed. There is a replying affidavit sworn by Ousainou Ngum the 1<sup>st</sup> Respondent herein on the 14<sup>th</sup> November 2017 and a further affidavit sworn on the 7<sup>th</sup> August 2018. The 3<sup>rd</sup> respondent did not file any response.

6. I have considered the notice of motion, the affidavit in support and the annexures. I have considered the affidavit in opposition and the annexures. I have also considered the oral submissions of counsel.

The issue for determination is whether this application is merited.

7. It is the applicant's submissions that the sole arbitrator has demonstrated bias towards the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Further that he is not capable of being impartial.

8. The 1<sup>st</sup> and 2<sup>nd</sup> respondents on the other hand state that this application has been brought in order to frustrate the arbitration proceedings.

9. I have gone through the annexures to the application. I note that the ruling of the sole arbitrator was rendered on 31<sup>st</sup> August 2017 in the presence of all the parties.

Section 14 (1) of the Arbitration Act provides that:-

***“Subject to subsection (3) the parties are free to agree on a procedure for challenging an arbitrator”.***

Section (2) :-

***“Failing on agreement under subsection (1), a party, who intends to challenge an arbitration shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in Section 13(3) send a written statement or the reasons is for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.”***

Section 14 (3):-

***“If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge apply to the high court to determine the matter.”***

10. There is no doubt that the application herein was filed in court way after the 30 days period. No justifiable reasons have been given to explain the delay in filing this application. No leave was sought before filing this application as the same is time barred. In my humble view, even if leave had been sought, the Act does not give this court powers to extend the time.

11. Section 14(8) of the Act provides that:-

***“While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful”.***

This means the pendency of the application does not mean the arbitral proceedings should be stopped.

12. Section 20 (1) of the Environment and Land Court Act provides that:-

***“Nothing in this Act, may be construed as precluding the court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation, arbitration and traditional dispute mechanism resolution in accordance with Article 159 (2) (c) of the Constitution.”***

13. Article 159 (2) of the Constitution implores courts and tribunals to ensure justice is not delayed, while exercising judicial authority. I find that justice will be better served if the proceedings before the sole arbitrator are allowed to proceed to conclusion.

14. I have gone through the annexures to the application and I note that the applicant herein proposed the sole arbitrator. This means it intended to subject itself to arbitration. I am guided by the Court of Appeal decision in **Niazsons (K) Limited vs China Road & Bridge Corporation Kenya Civil Appeal No 157 of 2000**.

15. It is on record that the applicant has participated extensively in the arbitral proceedings. I find that the applicant has failed to demonstrate instances of bias on the part of the 3<sup>rd</sup> respondent.

16. In my humble view, this application has been brought with the sole aim of frustrating the arbitration process. I note that there exists ELC No. 215 of 2017 in which the applicant herein has sued the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Clearly this demonstrate that the applicant is keen on delaying the arbitration process.

Having agreed to subject itself to arbitration it cannot be allowed to get out at this point.

17. The delay in the conclusion of the arbitral proceedings comes with a huge cost on the parties. I find no reason to interfere with the arbitral proceedings.

18. In conclusion, I find no merit in this application and the same is dismissed. Each party to bear its/his own costs.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 17<sup>th</sup> day of October 2018**

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**L. KOMINGOI**

**JUDGE**